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SUPREME COURT, U.S.

No. 07-1262

# In the Supreme Court of the United States

LETANTIA BUSSELL, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. *Whether, absent fundamental ambiguity in the* question, a false statement conviction may be based on a jury's determination that the defendant gave a knowingly false answer to the question as she understood it.

2. Whether the district court's restitution order was authorized under the Victim and Witness Protection Act of 1982 (VWPA), 18 U.S.C. 3663 (2000 & Supp. V 2005).

3. Whether petitioner's Sixth Amendment rights were violated when the district court, in determining petitioner's sentence, purportedly relied in part on conduct underlying a charge on which the jury had returned a verdict of not guilty.

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals after remand (Pet. App. 1a-29a) is reported at 504 F.3d 956. The prior opinion of the court of appeals (Pet. App. 30a-55a) is reported at 414 F.3d 1048. The various orders of the district court (Pet. App. 56a-116a) are unpublished.

### JURISDICTION

The judgment of the court of appeals was entered on September 27, 2007. A petition for rehearing was denied on December 5, 2007 (Pet. App. 119a-120a). On February 22, 2008, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including April 3, 2008, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial, petitioner was convicted in the United States District Court for the Central District of California on multiple counts of bankruptcy fraud and tax evasion. The court of appeals affirmed petitioner's convictions but remanded for resentencing. Pet. App. 30a-55a. On remand, the district court sentenced petitioner to 36 months of imprisonment and ordered restitution in the amount of $2,284,172.87. The court of appeals affirmed in part and reversed and remanded in part. *Id.* at 1a-29a.

1. a. Petitioner was a practicing dermatologist. Her late husband was an anaesthesiologist. In 1992, facing mounting tax and bank debts, the couple hired two attorneys to assist in pre-bankruptcy planning. Pet. App. 2a-3a; Gov't C.A. Br. 5.

Upon the attorneys' advice, petitioner reorganized her dermatology practice into three separate corporations: BBL Medical Management, Inc. (BBL), Beverly Hills Dermatology Medical Corp. (Beverly Hills Medical) and L.B. Bussell, MD Inc. (L.B. Bussell). BBL and Beverly Hills Medical were held in the names of nominee owners. Petitioner was the owner and officer of record for L.B. Bussell. BBL received the practice's gross receipts, paid expenses and overhead, and retained the profits of the business. The second corporation, Beverly Hills Medical, served as a conduit through which petitioner transferred between 10% and 20% of BBL's profits to the third corporation, L.B. Bussell, which paid petitioner an artificially reduced salary. Pet. App. 3a; Gov't C.A. Br. 9-10. The attorneys also helped petitioner and her husband set up various corporations to conceal ownership of a Utah condominium, a San Diego

farm, and receipt of disability insurance income. Pet. App. 3a-4a; Gov't C.A. Br. 12-15.

b. On March 7, 1995, petitioner and her husband filed a joint bankruptcy petition. Petitioner reported total assets of approximately $1.8 million and total liabilities exceeding $4.6 million. Pet. App. 4a. Petitioner failed to disclose her interests in BBL and Beverly Hills Medical. Gov't C.A. Br. 16-17. Specifically, petitioner omitted mention of either entity in her responses to Question 12 on Schedule B (requiring debtor to list "[s]tock and interests in incorporated and unincorporated businesses"), Question 33 of Schedule B (requiring disclosure of "[o]ther personal property of any kind not already listed"), and Question 16 of the Statement of Financial Affairs (requiring debtor to "list the names and addresses of all businesses in which the debtor was an officer, director, partner, or managing executive of a corporation"). Pet. App. 133a-139a.

Petitioner and her husband also failed to disclose the true market value of the Utah condo, thereby concealing their interest in $500,000 in equity in that property, as well as additional assets that they had fraudulently transferred to nominee owners or concealed. Gov't C.A. Br. 17-18.

In August 1995, the bankruptcy court discharged all their scheduled debts, except a claim by Provident Life Insurance Company in pending litigation, in the amount of $2,293,527.09. Pet. App. 4a.

2. In 2000, a grand jury returned a 17-count indictment charging petitioner, her husband, and one of their former attorneys with various fraud-related offenses. At trial, petitioner and her husband argued that they acted in good faith and relied on the advice of their lawyers. Pet. App. 4a.

The jury found petitioner guilty of conspiracy to conceal assets in contemplation of bankruptcy, to make false statements in the bankruptcy, and to conceal assets of the bankruptcy estate, in violation of 18 U.S.C. 371 (Count 1); concealing an ownership interest in BBL (Count 2) and in Beverly Hills Medical (Count 3), in violation of 18 U.S.C. 152(1) and (2); making false statements in the bankruptcy petition, including omission of interests in BBL and Beverly Hills Medical (Count 5) and omission of involvement as managing executives of those entities (Count 6), in violation of 18 U.S.C. 2 and 18 U.S.C. 152(3); and willfully attempting to evade a substantial portion of income tax owed for tax years 1983-1987, in violation of 26 U.S.C. 7201 (Count 12). The jury found petitioner not guilty of concealing ownership of the Utah condo (Count 4); making a false oath and account that she was not actively involved with any corporations other than L.B. Bussell, except on a passive investment basis (Count 11); and willfully attempting to evade a substantial portion of income tax owed for 1996 (Count 17). Pet. App. 4a-5a, 33a.[1]

3. At petitioner's original sentencing, the district court agreed with the recommendations of the Presentence Report (PSR paras. 77-81) and increased the offense level by 13 levels, based on a finding that petitioner's intended loss equaled $3,057,927.09, the full amount of debt petitioner attempted to discharge in bankruptcy. The district court agreed with the government that, given petitioner's true financial position, she would have been able to pay her debts and would not have obtained bankruptcy relief if she had not engaged

[1] While the jury was deliberating, petitioner's husband fell to his death from his hotel room. Pet. App. 4a. Petitioner's former attorneys entered into plea agreements with the government. *Id.* at 5a.

in the conspiracy to conceal her assets. Pet. App. 5a; Gov't C.A. Br. 21-22.

The district court imposed a mid-range Guidelines sentence of 36 months. The district court also ordered restitution of $2,393,527, which equaled the amount of debt actually discharged in bankruptcy, plus an unpaid settlement of $100,000 to Provident for a debt petitioner did not succeed in discharging. The district court assessed costs of prosecution of $62,614, and imposed a $50,000 fine. Pet. App. 5a-6a.

4. The court of appeals affirmed petitioner's convictions, vacated the restitution and cost orders, and ordered a limited remand pursuant to *United States* v. *Ameline*, 409 F.3d 1073 (9th Cir. 2005) (en banc). Pet. App. 30a-55a.

As relevant here, petitioner argued that the district court erred by submitting to the jury the charges based on answers to Question 12 from Schedule B and Question 16 from the Statement of Financial Affairs because, according to petitioner, they were "fundamentally ambiguous" questions. Pet. C.A. Br. 40-48 (No. 02-50495). Petitioner also argued that the evidence was insufficient to prove that petitioner's answers to the relevant questions were false as she understood the questions. The court of appeals rejected both arguments. The court explained that, although the answer to a "fundamentally ambiguous" question may not as a matter of law form the basis of a false statement prosecution, "we do not invalidate a conviction 'simply because the questioner and respondent might have different interpretations' of the relevant questions." Pet. App. 44a (quoting *United States* v. *Culliton*, 328 F.3d 1074, 1079 (9th Cir. 2003), cert. denied, 540 U.S. 1111 (2004)). Rather, the court of appeals explained, it examines "the context of the ques-

tion and answers, as well as other extrinsic evidence, to determine whether the respondent provided false answers to the questions 'as he understood [them].'" *Id.* at 44a-45a (quoting *Culliton*, 328 F.3d at 1079). The court thereafter concluded that the evidence showed that petitioner provided knowingly false answers by failing to disclose her interest and management role in BBL and Beverly Hills Medical. *Id.* at 45a-47a.

With respect to sentencing, the court of appeals deferred consideration of petitioner's challenges to the loss amount and remanded the case pursuant to *Ameline* for the district court to consider whether it would have imposed a materially different sentence had it known that the Guidelines were only advisory. Pet. App. 53a. The court also vacated the restitution order and remanded for the district court "to determine the actual losses caused by [petitioner's] fraudulent conduct—that is, to compare 'what actually happened with what would have happened if [she] had acted lawfully.'" *Id.* at 54a-55a (second set of brackets in original) (quoting *United States* v. *Feldman*, 338 F.3d 212, 220-221 (3d Cir. 2003)).

5. On remand, the district court declined to reopen the sentencing proceedings, finding that the 36-month sentence imposed was "just and reasonable" and that it would not have imposed a materially different sentence under an advisory Guidelines regime. Pet. App. 88a. The court essentially reaffirmed its approximately $2.3 million restitution order, finding that, based on petitioner's count 1 conspiracy conviction, petitioner "caused actual losses" to victims in the total amount of the bankruptcy debt scheduled to be discharged. *Id.* at 89a.

6. The court of appeals affirmed in part, reversed in part, and remanded. Pet. App. 1a-29a.

The court upheld petitioner's 36-month term of imprisonment, rejecting petitioner's various challenges to the district court's calculation of the loss amount under the Guidelines, including her claim that the loss amount should not include equity in the Utah condo because she was acquitted of concealing that equity. Pet. App. 6a-15a. The court of appeals noted that "[t]he district court is entitled to take into account all relevant conduct, charged and uncharged," in sentencing a defendant. *Id.* at 12a n.8.

The court of appeals also affirmed the restitution order. The panel rejected petitioner's challenge to the methodology used by the district court to calculate actual loss. The panel upheld the district court's determination "that the value of the assets exceeded the debts to be discharged and therefore the actual loss to the creditors equaled the amount of debt actually discharged in the bankruptcy." Pet. App. 20a.

In addition, the court of appeals rejected petitioner's argument that, under *Hughey* v. *United States*, 495 U.S. 411 (1990), the district court could order restitution based only on the specific assets she was convicted of concealing in count 2 (her interest in BBL) and count 3 (her interest in Beverly Hills Medical). Pet. App. 20a-21a. The court of appeals held that *Hughey* was "of no avail to [petitioner] because, after *Hughey* was decided, Congress amended the VWPA by expanding the definition of 'victim,' in part to overrule that decision." *Id.* at 21a. The court of appeals reasoned that, "'[u]nder the amended statute, when someone is convicted of a crime that includes a scheme, conspiracy, or pattern of criminal activity *as an element* of the offense, the court can order restitution for losses resulting from any conduct that was part of the scheme, conspiracy, or pattern of

criminal activity.'" *Id.* at 22a (quoting *United States* v. *Reed*, 80 F.3d 1419, 1423 (9th Cir.), cert. denied, 519 U.S. 882 (1996)). Because petitioner "was convicted of a crime that included a conspiracy 'as an element of the offense,'" the court of appeals concluded, "the district court did not err in considering all of the concealed assets for purposes of determining the actual loss to the bankruptcy creditors." Pet. App. 22a-23a.[2]

**ARGUMENT**

1. Petitioner asserts (Pet. 13-24) that there is a circuit conflict on whether a false statement conviction may be based on the answer to a question, absent fundamental ambiguity, as long as the jury finds that the defendant falsely answered the question as she understood it. There is no square conflict, petitioner did not argue for a contrary rule below, and the court of appeals' rule (as applied here) comports with due process. Petitioner's claim thus warrants no further review.

a. The court of appeals applied its rule that a jury should determine whether the defendant gave a false answer to the question as she understood it, unless the question is so "fundamentally ambiguous" that "men of ordinary intelligence cannot arrive at a mutual understanding of its meaning." *United States* v. *Culliton*, 328 F.3d 1074, 1078 (9th Cir. 2003) (internal quotation marks omitted), cert. denied, 540 U.S. 1111 (2004). Petitioner does not dispute that all the other circuit courts, with the lone exception of the Fourth Circuit, agree with the Ninth Circuit. See *United States* v. *Hatch*, 434 F.3d 1,

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[2] The court of appeals reversed in part and remanded, based on its ruling that certain trust deeds should have been reconveyed to petitioner when the court of appeals vacated the original sentencing order. Pet. App. 27a-29a.

5 (1st Cir. 2006); *United States* v. *Damrah*, 412 F.3d 618, 626 (6th Cir. 2005); *United States* v. *Farmer*, 137 F.3d 1265, 1268-1269 (10th Cir. 1998); *United States* v. *Robbins*, 997 F.2d 390, 395 (8th Cir.), cert. denied, 510 U.S. 948 (1993); *United States* v. *Manapat*, 928 F.2d 1097, 1099-1100 (11th Cir. 1991); *United States* v. *Ryan*, 828 F.2d 1010, 1015 (3d Cir. 1987); *United States* v. *Lighte*, 782 F.2d 367, 372-373 (2d Cir. 1986); *United States* v. *Martellano*, 675 F.2d 940, 942 (7th Cir. 1982); *United States* v. *Thompson*, 637 F.2d 267, 270 (5th Cir. 1981); *United States* v. *Chapin*, 515 F.2d 1274, 1279-1280 (D.C. Cir.), cert. denied, 423 U.S. 1015 (1975).

Petitioner alleges (Pet. 15-16) a circuit conflict based on the Fourth Circuit's decision in *United States* v. *Race*, 632 F.2d 1114, 1120 (1980). A review of cases from the Fourth Circuit, however, shows that there is no square conflict. In *Race*, the Fourth Circuit held that the defendants could not be prosecuted under 18 U.S.C. 1001 for submitting false and fraudulent invoices to the government, when those invoices were submitted pursuant to an arguably ambiguous contractual provision. The court reasoned that the contractual language could not support the government's construction but added that, even if the contractual language were ambiguous, the result would have been the same. 632 F.2d at 1119-1120. The court noted, however, that there was no evidence in that case to support a finding that the defendants had acted in bad faith in seeking reimbursement (*e.g.*, by construing the contractual language as the government did). *Id.* at 1120-1121. Petitioner cites no Fourth Circuit case holding that a defendant could not be prosecuted for perjury for making a false statement when, even if the question was somewhat ambiguous,

there was evidence that the defendant understood the question as the government did.

Further, in more recent cases, the Fourth Circuit has relied on the rule that a prosecution for perjury is foreclosed only if the question is "fundamentally ambiguous." See *United States* v. *Heater*, 63 F.3d 311, 327 (1995) ("In this case * * * we find no 'fundamental ambiguity' that would have required the district court to remove the questions from the jury's consideration."), cert. denied, 516 U.S. 1083 (1996); see also *United States* v. *Bollin*, 264 F.3d 391, 411 (noting that in *Heater* the court had affirmed a perjury conviction "because the question did not contain any fundamental ambiguity that would have prevented the jury from considering the question"), cert. denied, 534 U.S. 935 (2001), and 535 U.S. 989 (2002); *United States* v. *Gunther*, No. 96-4804, 1998 WL 29259, at *3-*4 (Jan. 28, 1998) (unpublished) (affirming defendant's perjury conviction because "[a]n inquiry is not rendered fundamentally ambiguous merely because 'the words in question have different meanings in different situations'") (quoting *Lighte*, 782 F.2d at 375). Indeed, even in a case where the facts made the Fourth Circuit "sympathetic" to the defendant's claim that the questions posed to him were susceptible to an alternative interpretation that would have made his answers truthful, the Fourth Circuit nonetheless affirmed the perjury conviction because it was "satisfied" that the context "provided the jury an adequate basis upon which to conclude that [the defendant] understood" the questions as the government intended and "that he deliberately lied" in his responses. *United States* v. *Bryan*, 58 F.3d 933, 960 (1995). In light of those cases, petitioner is unable to demonstrate a square

conflict between the Ninth Circuit's rule (adopted by every other circuit) and that of the Fourth Circuit.

In any event, this case is not a good vehicle for resolving any tension between the Ninth Circuit and the Fourth Circuit. Petitioner argued below only that the false statement allegations in the indictment were impermissible because they were based on "fundamentally ambiguous" questions. She did not ask the courts to apply a more protective standard, nor did she bring the courts' attention to the Fourth Circuit's decision in *Race*. See Pet. C.A. Br. 40-48 (No. 02-50495). Accordingly, because the lower courts had no occasion to consider whether a different standard should be applied, this case is a poor vehicle for resolution of that issue.

b. The Ninth Circuit applied the correct standard in evaluating any ambiguity in the challenged questions that were the basis of some of the false statement allegations in the indictment. "Almost any question or answer can be interpreted in several ways when subjected to ingenious scrutiny after the fact." *Chapin*, 515 F.2d at 1279-1280 (quoting *United States* v. *Ceccerelli*, 350 F. Supp. 475, 478 (W.D. Pa. 1972)). To preclude prosecution whenever a question is somewhat ambiguous, as petitioner advocates, even though the evidence is sufficient for the jury to conclude beyond a reasonable doubt that a particular defendant understood the question as it was intended and answered it falsely, would severely limit the reach of false statements statutes and thereby significantly impede Congress's efforts to promote truth-telling in government matters.

Contrary to petitioner's contention (Pet. 17-18), the rule applied by the Ninth Circuit and the other courts of appeals does not violate due process principles of fair notice. Under the court of appeals' rule, a jury may find

a defendant guilty only after concluding that the defendant understood the question as the government did and, having that understanding, answered falsely. Such a rule, with its requirement of a finding that a defendant had knowledge of the falsity of her statement before allowing conviction, is more than sufficient to give a person of ordinary intelligence fair notice of the type of conduct that is forbidden. Cf. *Posters 'N' Things, Ltd.* v. *United States*, 511 U.S. 513, 526 (1994) (scienter requirement in criminal statute "assists in avoiding any vagueness problem").

Petitioner's reliance (Pet. 17, 19) on *Bronston* v. *United States*, 409 U.S. 352 (1973), is also misplaced. In *Bronston*, this Court held that an individual could not be convicted of perjury under 18 U.S.C. 1621 for giving an answer that was literally true, even if it was not responsive and arguably misleading. In that case, the defendant was asked under oath whether he had ever had any accounts in Swiss banks. 409 U.S. at 354. He answered that his company had previously had an account in a Swiss bank, but failed to disclose that he had personally had such an account as well. *Ibid.* The defendant's answer was literally true, because the company had in fact had such an account. *Ibid.* The Court reversed the defendant's conviction. *Id.* at 362. *Bronston*'s rule is not helpful to petitioner because it is "limited to cases in which the statement is indisputably true, though misleading because it was unresponsive to the question asked. Different rules govern statements that are ambiguous, in which the statement may be true according to one interpretation and false according to another." *United States* v. *Camper*, 384 F.3d 1073, 1076 (9th Cir. 2004), cert. denied, 546 U.S. 827 (2005); see *United States* v. *DeZarn*, 157 F.3d 1042, 1051 (6th Cir. 1998)

(*Bronston* defense "applies in cases where a perjury defendant responds to a question with an *unresponsive* answer"); *Ryan*, 828 F.2d at 1014 (*Bronston* would "only be operative in those cases in which the defendant has been accused of making a statement that is both unresponsive and literally true"). Here, petitioner does not contend that her responses were "indisputably true" but misleading because not responsive. She contends only that she did not respond falsely to one reasonable construction of an allegedly ambiguous question. Therefore, *Bronston* is inapplicable.[3]

2. Petitioner challenges (Pet. 24-37) the restitution order based on her claim that it is premised in part on conduct of which she has not been convicted, "whether because of acquittal or because the conduct was never charged in the indictment." Pet. 36. She argues that the district court's restitution order is not authorized under the Victim and Witness Protection Act of 1982 (VWPA)[4]

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[3] Petitioner does not appear to challenge here the court of appeals' application of its rule to the facts of this case. In this Court, petitioner argues only that the questions were "ambiguous," not that they were "fundamentally ambiguous" or that the evidence was insufficient to find that she provided false answers to the questions as she understood them. Pet. 20. In any event, the court of appeals correctly rejected petitioner's challenges on those grounds below (Pet. App. 45a-47a), and such a factbound issue would not merit this Court's review.

[4] The VWPA was enacted in 1982 and is currently codified at 18 U.S.C. 3663 & 3664 (2000 & Supp. V 2005). The Mandatory Victims Restitution Act of 1996 (MVRA) was enacted in 1996 and is codified at 18 U.S.C. 3663A. The MVRA addresses mandatory restitution, while the VWPA addresses discretionary restitution. The VWPA applies in this case because the offense conduct took place before 1996. The statutory language at issue in this case is contained in both the VWPA and the MVRA, and therefore cases discussing either statute are pertinent. See *United States* v. *Grice*, 319 F.3d 1174, 1177-1178 (9th Cir.), cert. denied, 539 U.S. 950 (2003).

and that this Court's review is warranted because the circuits are in conflict on whether restitution can be based on acquitted conduct. She also contends that the court of appeals' interpretation of the VWPA violates the Sixth Amendment right to trial by jury. Significantly, in light of the district court's methodology for calculating restitution, this case does not present the questions on which petitioner seeks review. In any event, the court of appeals correctly upheld the restitution order, and there is no square conflict among the circuit courts. Petitioner's claims therefore do not merit further review.

a. The VWPA provides that a court may order a "defendant convicted of an offense" under the federal criminal code to "make restitution to any victim of such offense." 18 U.S.C. 3663(a)(1)(A) (Supp. V 2005). In *Hughey* v. *United States*, 495 U.S. 411 (1990), the Court held that the VWPA "authorize[d] an award of restitution only for the loss caused by the specific conduct that is the basis of the offense of conviction." *Id.* at 413. After that decision, Congress amended the VWPA (Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990, Pub. L. No. 101-647, § 2509, 104 Stat. 4863) to provide that, when an offense "involves as an element a scheme, conspiracy, or pattern of criminal activity," restitution may be ordered to "any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern." 18 U.S.C. 3663(a)(2).

Here, the district court ordered restitution based on the conspiracy alleged in Count 1. Petitioner was convicted of conspiring to conceal assets in contemplation of bankruptcy, to make false statements under oath in relation to bankruptcy, and to conceal assets of the bank-

ruptcy estate. Pet. App. 148a-149a. Although Count 1 specified three assets concealed by petitioner— her interest in BBL, her interest in Beverly Hills Medical, and her equity in the Utah condo—the indictment made clear that the specified "means of the conspiracy" and "overt acts" were not all-inclusive. *Id.* at 150a, 161a. The indictment also alleged as "the purpose of the conspiracy" not merely the protection of those three specific assets, but enabling petitioner and her husband "to discharge their outstanding debts * * * while maintaining control over and access to" property concealed in anticipation of bankruptcy and property of the bankruptcy estate. *Id.* at 149a. The district court found that restitution was owed to all the creditors whose claims had been discharged in bankruptcy because, if petitioner had acted lawfully and not engaged in a conspiracy to conceal assets, she would not have been eligible for bankruptcy relief because her assets exceeded her liabilities. *Id.* at 88a-89a; see *id.* at 24a (upholding district court's restitution order because "had [petitioner] acted lawfully, the value of the assets exceeded the debts to be discharged and therefore the actual loss to the creditors equaled the amount of debt actually discharged in the bankruptcy"). Because all those creditors were "directly harmed by the defendant's criminal conduct in the course of the * * * conspiracy," restitution was justified under the text of the VWPA. 18 U.S.C. 3663(a)(2).

At the threshold, in light of the district court's method for calculating restitution, this case is a poor vehicle for considering whether restitution may be based on acquitted conduct or conduct not specifically charged in the indictment, because the restitution ordered here is not specifically tied to such conduct. Those issues would be presented if, for example, the district court had based

restitution on the total value of all items it found to be illegally concealed and, in calculating that total, had included the value of the Utah condo (which petitioner was acquitted of fraudulently concealing in Count 4) as well as assets not specifically identified in the indictment (but found to be illegally concealed by a preponderance of the evidence). The district court, however, employed a different approach: it found that, had petitioner not engaged in the Count 1 conspiracy, she would not have been entitled to discharge in bankruptcy because her assets (which would necessarily include all her assets, whether fully disclosed, inadvertently omitted, or illegally concealed) were greater than her liabilities. Thus, it was not necessary to the district court's restitution order that it find that petitioner had conspired illegally to conceal her interest in the Utah condo or to fail to disclose her interests in other property not specified in the indictment. Regardless, those assets would have been included in the district court's calculation of the total assets to attribute to petitioner in determining whether she would have been entitled to a discharge in bankruptcy. Accordingly, this case does not present the questions on which petitioner seeks review.

b. Further, and contrary to petitioner's suggestion, the decision below does not directly conflict with rulings from other courts of appeals. Indeed, petitioner does not even allege a conflict among the circuits on whether restitution may be based on conduct not specifically charged in the indictment in a conspiracy case. She only alleges a conflict on whether acquitted conduct may be used in calculating restitution, where such conduct is also in furtherance of a scheme or conspiracy of which the defendant has been convicted.

Petitioner principally asserts a conflict with the Seventh Circuit's decision in *United States* v. *Kane*, 944 F.2d 1406, 1414 (1991). In that case, the district court had ordered a defendant to pay restitution for the full amount of loss caused by a bank fraud conspiracy, even though the defendant had been acquitted of two out of five specific incidents of submitting a fraudulent loan application, each of which had been alleged as overt acts of the conspiracy. The Seventh Circuit vacated the restitution order, holding that "the jury's acquittal" on two counts "must be taken as a judgment that the conspiracy did not include the acts charged in those counts." *Id.* at 1414. As the court of appeals here correctly reasoned, however, reliance on the ruling in *Kane* is "misplaced because the acts in that case occurred well before the effective date of this amendment to the VWPA," Pet. App. 21a-22a n.12, which "changed the definition of 'victim' to partially overrule *Hughey* and allow restitution beyond the specific acts of conviction." *United States* v. *Grice*, 319 F.3d 1174, 1177 (9th Cir.), cert. denied, 539 U.S. 950 (2003). Because the Seventh Circuit might well come to a different conclusion based on its interpretation of the amended statute, resolution of any tension between the approach taken in *Kane* and the other circuits would be premature.

The other Seventh Circuit cases cited by petitioner do not pose any conflict. They either do not involve convictions for offenses that contain a scheme, conspiracy, or pattern as an element,[5] or simply recite the standard that restitution must be tied to the offense of conviction

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[5] See *United States* v. *Frith*, 461 F.3d 914, 920-921 (7th Cir. 2006); *United States* v. *Randle*, 324 F.3d 550, 556-557 (7th Cir. 2003); *United States* v. *Polichemi*, 219 F.3d 698, 706, 714 (7th Cir.), cert. denied, 531 U.S. 993 (2000), and 531 U.S. 1168 (2001).

without addressing acquitted conduct.[6] In agreement with the Ninth Circuit, the Seventh Circuit acknowledges that, where the offense of conviction includes a scheme, conspiracy, or pattern as an element, restitution may be ordered for all "actions pursuant to that scheme," even if not specifically charged in the indictment. *United States* v. *Bennett*, 943 F.2d 738, 740 (1991), cert. denied, 504 U.S. 987 (1992); see *United States* v. *Turino*, 978 F.2d 315, 319 (7th Cir. 1992), cert. denied, 508 U.S. 975 (1993).

Nor is petitioner able to demonstrate a square conflict with the Third Circuit. Petitioner's reliance on *United States* v. *Pedroni*, 45 Fed. Appx. 103, cert. denied, 537 U.S. 1045 (2002), and *United States* v. *Console*, 13 F.3d 641 (1993), cert. denied, 511 U.S. 1076, and 513 U.S. 812 (1994)—both of which rejected a defendant's argument that a restitution award was excessive—is misplaced. In dicta, the Third Circuit did state (despite little analysis) that a district court acted properly in not awarding restitution based on a "loss associated with the charges for which [the defendant] was acquitted." *Pedroni*, 45 Fed. Appx. at 111 n.13; see *Console*, 13 F.3d at 674. But *Pedroni* is an unpublished decision and the dicta in *Console*, like the Seventh Circuit's decision in *Kane*, predates the VWPA amendment. Petitioner cites no case in which the Third Circuit has vacated an order requiring restitution for the losses associated with an entire conspiracy or scheme based on the defendant's acquittal in another count.

Finally, petitioner's reliance on the Fifth Circuit's decision in *United States* v. *Adams*, 363 F.3d 363 (2004),

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[6] See *United States* v. *George*, 403 F.3d 470, 474 (7th Cir.), cert. denied, 546 U.S. 1008 (2005); *United States* v. *Bennett*, 943 F.2d 738, 740 (7th Cir. 1991), cert. denied, 504 U.S. 987 (1992).

is misplaced. Like many of the other cases cited by petitioner, *Adams* did not involve acquitted conduct. In *Adams*, the Fifth Circuit held only that, "when a defendant pleads guilty to fraud, the scope of the requisite scheme to defraud, for restitution purposes, is defined by the mutual understanding of the parties rather than the strict letter of the charging document." *Id.* at 364. Nothing in *Adams* disturbs the Fifth Circuit's prior holding in *United States* v. *Chaney*, 964 F.2d 437, 452-453 (1992), that restitution may be ordered for loss caused by an entire conspiracy, even where the defendant was acquitted of some of the conduct also alleged to be in furtherance of the conspiracy.[7]

c. Regardless of any claimed conflict, petitioner is incorrect on the merits. Count 1 charged a broad conspiracy to conceal assets. As stated in a case relied on by petitioner, because proof of the conspiracy is an element of the offense of conviction, "actions pursuant to that [conspiracy] should be considered 'conduct that is the basis of the offense of conviction'" under *Hughey*.

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[7] Petitioner also cites *United States* v. *Jeffery*, No. 93-6295, 1994 WL 468099, at *9 (10th Cir. Aug. 25, 1994) (unpublished), cert. denied, 513 U.S. 1196 (1995), for the proposition that, in a conspiracy case involving a scheme to defraud, restitution may not be ordered for acts pursuant to the scheme but not specifically charged in the indictment. *Jeffery*, however, is an unpublished decision that relied on cases from other circuits involving conduct that predated the 1990 VWPA amendment. *Id.* at *9 n.1. In subsequent published cases, the Tenth Circuit has made clear that the VWPA as amended allows restitution for losses associated with "the broader scheme" alleged in a count of conviction, where the offense involves a scheme, conspiracy, or pattern of criminal activity. *United States* v. *Berger*, 251 F.3d 894, 898 n.2 (2001) (citing *United States* v. *Hensley*, 91 F.3d 274, 277 (1st Cir. 1996)); see *United States* v. *Gordon*, 480 F.3d 1205, 1211 (2007).

*Bennett*, 943 F.2d at 740 (quoting *Hughey*, 495 U.S. at 414). Accordingly, as the court of appeals correctly reasoned, when a restitution order is based on a conspiracy conviction, a court can order restitution for losses resulting from any conduct that was part of the conspiracy "and not just from specific conduct that met the overt act requirement of the conspiracy conviction." Pet. App. 22a (quoting *United States* v. *Reed*, 80 F.3d 1419, 1423 (9th Cir.), cert. denied, 519 U.S. 882 (1996)); see *United States* v. *Hensley*, 91 F.3d 274, 277 (1st Cir. 1996) ("Thus, the outer limits of a VWPA § 3663(a)(2) restitution order encompass all direct harm from the criminal conduct of the defendant which was within any scheme, conspiracy, or pattern of activity that was an element of any offense of conviction."); *Turino*, 978 F.2d at 319 ("because the scheme is an element of the offense of mail fraud, a conviction for mail fraud can support a conviction for a broad scheme even though the defendant is not specifically convicted for each fraudulent act encompassed within this scheme").

Nor would the fact that petitioner had been acquitted on some other count preclude a court, under the plain text of the statute or the reasoning of *Hughey*, from ordering full restitution for the conspiracy count on which petitioner was convicted. Petitioner's argument, at bottom, is a challenge alleging "inconsistencies in the jury's verdict." *Chaney*, 964 F.2d at 452 (rejecting argument that "[r]estitution under the Victim and Witness Protection Act is forbidden for losses that may be attributed to conduct that is the basis of charges for which the defendant is acquitted") (citation omitted). But "an irreconcilable jury verdict does not warrant reversal of a criminal conviction * * * because each count in an indictment is to be considered as a separate indictment." *United*

*States* v. *Walker*, 9 F.3d 1245, 1248 (7th Cir. 1993) (citations omitted), cert. denied, 511 U.S. 1096 (1994). Likewise, as at least four courts of appeals agree, the validity of a restitution order as to one count of conviction is not undermined by a defendant's acquittal on a separate count, even where the latter charge involves some of the same conduct as the former charge. See *United States* v. *Boyd*, 222 F.3d 47, 51 (2d Cir. 2000) ("[T]he VWPA confers authority to order a participant in a conspiracy to pay restitution even on uncharged or acquitted counts."); see also *United States* v. *Foley*, 508 F.3d 627, 635-636 (11th Cir. 2007); *United States* v. *Booth*, 309 F.3d 566, 575-576 (9th Cir. 2002); *Chaney*, 964 F.2d at 452. That is particularly true here, where petitioner's acquittal on a *substantive* charge of concealing her interest in the Utah condo is not necessarily inconsistent with a charge that she and her co-conspirators *conspired* to conceal that asset, among others.

d. Petitioner's claim (Pet. 37) that the Ninth Circuit's interpretation of the VWPA as authorizing restitution based on acquitted conduct violates her Sixth Amendment right to trial by jury merits no further review. As discussed below (pp. 22-23, *infra*), all the circuits correctly have held that a court may consider acquitted conduct at sentencing. Furthermore, all nine courts of appeals to have considered the issue have correctly rejected the argument that restitution must be determined by a jury. See *United States* v. *Milkiewicz*, 470 F.3d 390, 403-404 (1st Cir. 2006) (collecting cases). And this case is not a good vehicle for resolving that issue because, as explained above (p. 15, *supra*), the restitution order did not depend on a finding that the Utah condo was illegally concealed, and, moreover, the court

of appeals did not address the constitutionality of the restitution order.

3. Petitioner contends (Pet. 38-40) that her Sixth Amendment rights were violated because the district court, in determining her sentence of imprisonment, relied in part on conduct underlying Count 4, on which she had been acquitted. The court's loss calculation, however, did not depend on a finding that petitioner illegally concealed the Utah condo, and therefore this case does not raise the question on which petitioner seeks review. See p. 15, *supra*. In any event, as the government has explained in briefs in opposition to other petitions raising the acquitted conduct issue, this Court's review is unwarranted. See, *e.g.*, Gov't Br. in Opp. at 8-13, *Mercado* v. *United States*,128 S. Ct. 1736 (2008); Gov't Br. in Opp. at 7-13, *Ashworth* v. *United States*, 128 S. Ct. 1738 (2008).

In *United States* v. *Watts*, 519 U.S. 148 (1997) (per curiam), this Court held that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." *Id.* at 157. Although *Watts* specifically addressed a challenge to consideration of acquitted conduct based on double jeopardy principles rather than the Sixth Amendment, the clear import of the Court's decision is that sentencing courts may take acquitted conduct into account at sentencing without offending the Constitution. See *ibid.* That principle predated the Sentencing Guidelines, see *id.* at 152, and it fully applies to the advisory Guidelines put in place by *United States* v. *Booker*, 543 U.S. 220 (2005).

Since *Booker*, every court of appeals has held that a district court may consider acquitted conduct at sen-

tencing. See *United States* v. *Jimenez*, 513 F.3d 62, 88 (3d Cir.), cert. denied, 07-1291, 2008 WL 1751518 (May 12, 2008); *United States* v. *Ashworth*, 247 Fed. Appx. 409, 410 (4th Cir. Sept. 6, 2007), cert. denied, 128 S. Ct. 1738 (2008); *United States* v. *Mendez*, 498 F.3d 423, 426-427 (6th Cir. 2007); *United States* v. *Hurn*, 496 F.3d 784, 788 (7th Cir. 2007), cert. denied, 128 S. Ct. 1737 (2008); *United States* v. *Mercado*, 474 F.3d 654, 656-658 (9th Cir. 2007), cert. denied, 128 S. Ct. 1736 (2008); *United States* v. *Gobbi*, 471 F.3d 302, 314 (1st Cir. 2006); *United States* v. *Farias*, 469 F.3d 393, 399 & n.17 (5th Cir. 2006), cert. denied, 127 S. Ct. 1502 (2007); *United States* v. *High Elk*, 442 F.3d 622, 626 (8th Cir. 2006); *United States* v. *Dorcely*, 454 F.3d 366, 371 (D.C. Cir.), cert denied, 127 S. Ct. 691 (2006); *United States* v. *Vaughn*, 430 F.3d 518, 525-527 (2d Cir. 2005), cert. denied, 547 U.S. 1060 (2006); *United States* v. *Magallanez*, 408 F.3d 672, 684-685 (10th Cir.), cert. denied, 546 U.S. 955 (2005); *United States* v. *Duncan*, 400 F.3d 1297, 1304-1305 (11th Cir.), cert. denied, 546 U.S. 940 (2005).[8]

This Court has recently denied petitions raising the issue. See, *e.g.*, *Hurn* v. *United States*, 128 S. Ct. 1737 (2008); *Mercado* v. *United States*, 128 S. Ct. 1736 (2008); *Ashworth* v. *United States*, 128 S. Ct. 1738 (2008). There is no reason for a different result here.[9]

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[8] After the Sixth Circuit in *Mendez* upheld a district court's consideration of acquitted conduct at sentencing, it granted rehearing en banc in a separate case raising the same issue. See *United States* v. *White*, 503 F.3d 487 (2007) (vacated and rehearing en banc granted by unpublished order dated November 30, 2007; argued June 4, 2008).

[9] Contrary to petitioner's suggestion, there is no need to hold this case pending the Court's decision in *Oregon* v. *Ice*, cert. granted, No. 07-901 (Mar. 17, 2008), which raises the separate question whether the Sixth Amendment is violated by the imposition of consecutive

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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sentences based on a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant.